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The Question of Family Law After Legal Motherhood

RESEARCH

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ABSTRACT

What does it mean to be a 'mother' in law? This is a question that arose in English and Welsh law only relatively recently, in a case brought by Freddy McConnell, a trans man who had given birth and sought to be registered on the baby's birth certificate as the 'father' or alternatively as the 'gestational parent' or 'parent'. The conceptualisation of legal motherhood that emerged from this case was one in which being a 'mother' was defined as being about the biological role of carrying a pregnancy and delivering a baby – a role that was considered not to be gender-specific. This contribution reflects on the debate that has followed in the family law literature and highlights the way in which it is underpinned by a sense that doing away with the current conceptualisation of legal motherhood would open up the capacity and potential of family law when it comes to the legal recognition and protection of family life. The question becomes, in this way, one of family law after legal motherhood – of what family law might look like after the current conceptualisation of legal motherhood.

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1. INTRODUCTION: THE QUESTION OF THE MEANING OF LEGAL MOTHERHOOD

What does the term 'mother' mean in law? Who, more specifically, is a 'mother' in law? Until relatively recently, it was assumed that the answer to these questions was settled in English and Welsh family law, and that the (legal) mother of a child was the person who had given birth to that child.[1] It was also assumed that this person would be female.[2] This position had not gone unchallenged in the legal literature, not least because of its conflation of giving birth and motherhood and its restriction of legal motherhood to one person.[3] But the basic question of the definition of the 'mother' in law did not arise in the case law until a case in which a trans man who had given birth sought to be registered on the baby's birth certificate as the 'father' or alternatively as the 'gestational parent' or 'parent' (1, 6). The question for the court was: how was he to be recorded – as the child's 'mother', 'father', or 'parent'? And what did these terms mean, as a matter of law?

The case, brought by Freddy McConnell, has sparked a lively discussion in the family law literature, with debates spanning the way in which legal parenthood is constructed, the purpose and nature of the birth registration system, and – of particular interest from the perspective of this symposium – the relationship between the legal concepts of gender and parenthood and their wider relation, in turn, to social and psychological understandings of gender and parenthood (see, e.g., 7, 8, 9, 10, 11, 12, 13, 14, 15). The argument that McConnell had made before the court was that the terms 'mother' and 'father' are gendered, and that given that his legal gender was male, he ought to be registered as the child's father. The High Court and Court of Appeal disagreed with this, however, and the conceptualisation of legal motherhood that emerged from their judgments was one in which being a 'mother' in law was defined as being about the biological role of carrying a pregnancy and delivering a baby – a role that was considered not to be gender-specific.[4] Since then, it has been suggested in the legal literature that given the disjuncture that this construction of legal motherhood is liable to entail – between, in McConnell's case, McConnell's sense of himself as the child's father and his legal status as mother; and between, at a more general level, social and legal understandings of motherhood – it is time to rethink legal parenthood entirely. Two lines of thinking have emerged in particular: one that suggests moving beyond the terms 'mother' and 'father' in law and adopting a gender-neutral model of legal parenthood, and another that suggests retaining the terms 'mother' and 'father' in law but rethinking the way in which they are constructed.

1 See, e.g., Sir Andrew McFarlane, President of the Family Division, in para.1 of his judgment in the *Freddy McConnell* case (1): 'In this case the court is required to define the term "mother" under the law of England and Wales. Down the centuries, no court has previously been required to determine the definition of "mother" under English common law and, it seems that there have been few comparable decisions made in other courts elsewhere in the Western world. Hitherto, a person who has given birth to a child has always been regarded as that child's mother…'. See also the statement of Lord Simon in *The Ampthill Peerage* [1977] A.C. 547, at p577B that '[m]otherhood, although also a legal relationship, is based on a fact, being proved demonstrably by parturition'. And see too s33 of the Human Fertilisation and Embryology Act 2008 (on legal motherhood in 'cases involving assisted reproduction'). S33(1) provides that '[t]he woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child'.

2 See e.g., Sir Andrew McFarlane, President of the Family Division, in para.131 of his judgment in the *Freddy McConnell* case (1): 'there is a dearth of authority at common law on the definition of a "mother". That this is so may be unsurprising for, until recent times, there will have been no doubt that a woman who gives birth to a child is that child's mother. No other means of achieving pregnancy, save through conception by the fertilisation of an ovum by sperm inside a womb, was possible, and a person whose physical make-up was configured to facilitate such conception, and to carry a pregnancy to birth, was always considered to be female'. See also para.139: 'It is undoubtedly the case that throughout history the role of being a gestational mother has been undertaken by females, but is being female the essential or determining attribute of motherhood?'.

3 See, e.g., the references to the pieces by Katherine O'Donovan and Jill Marshall, Katherine O'Donovan, and Julie McCandless and Sally Sheldon at (2, 3, 4) (the latter at p193–197 [on the 'steadfast resistance to the possibility that a child can have two "mothers" (or indeed two "fathers")' – p193] and the use of the term 'second female parent' in cases of female same-sex couples). And on the implications more specifically in relation to surrogacy arrangements (as the law currently stands, the surrogate will be the legal mother under s33(1) of the Human Fertilisation and Embryology Act 2008, with legal parenthood then being transferred to the intended parent or parents by way of a parental order [on which see ss54 and 54A of the 2008 Act]), see, e.g., the article by Kirsty Horsey referred to at (5). See further, recommending reform of the way in which parenthood is attributed in surrogacy cases: Law Commission. Building families through surrogacy: a new law. Law Commission; 2023, available at: https://lawcom.gov.uk/project/surrogacy/.

4 It is notable that this wasn't really the focus of the Court of Appeal, which was more focused on statutory interpretation (see further Alan Brown's point [10 p169] about the way in which the judgment of the Court of Appeal 'frames the central issues of the case in a highly technical and legalistic manner. This is especially apparent when compared to the wide-ranging approach taken by the President at first instance. This framing allows the court to ignore some of the more conceptual questions and the issues of public policy that are undoubtedly raised by the underlying issue of the parental status of men who give birth'. See further the article by Alan Brown at (12).

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The purpose of this contribution to this symposium on research relating to gender is to reflect on the lines of this debate and to consider, in particular, what the suggestions that stem from them might mean and entail in practice. The two lines of thinking are fundamentally about closing the gap between legal and social reality. But they are also underpinned by a sense that doing away with the current conceptualisation of legal motherhood would open up the capacity and potential of family law when it comes to the legal recognition and protection of family life. The debate becomes, in that way, one that is not only about the relationship between the legal concepts of gender and parenthood – and about the relationship between these legal concepts and social and psychological understandings of gender and parenthood – but also about what family law might look like *after* legal motherhood.

2. DEFINING THE LEGAL MOTHER: THE *MCCONNELL* CASE

McConnell gave birth to his son, YY, after obtaining a Gender Recognition Certificate that recognised his gender as male. He wanted to be recorded on his baby's birth certificate as the father but was told by the Registrar General that he would have to be registered as the mother. McConnell objected to this and brought a claim in judicial review against the Registrar General's decision. There were two lines to his claim. The first was that the terms 'mother' and 'father' are gender-specific and that, since his legal gender was male, he was entitled, as a matter of domestic law, to be regarded and registered as YY's father, or otherwise as his parent or gestational parent. The second was that if the court held that domestic law required him to be registered as YY's mother, this would entail a breach of his and YY's rights under the European Convention on Human Rights (ECHR).

The case first came before Sir Andrew McFarlane, President of the Family Division, who started with the common law position: that 'the person who carries a pregnancy and gives birth to a child is that child's "mother"' and that '[t]he attribution of motherhood is a consequence of the individual's unique role in the biological process of pregnancy and birth' (1 para.135). This definition of 'mother' was, Sir Andrew McFarlane considered, not a gender-specific one; rather, it was about 'the role taken in the biological process' (1 para.139).[5] The position it entailed (that a person who carries a pregnancy to term and gives birth is the 'mother' in law) was considered not to be affected by the provisions of the Gender Recognition Act 2004 (under which Freddy McConnell had obtained his Gender Recognition Certificate). In particular, Section 12 (which provides that '[t]he fact that a person's gender has become the acquired gender under this Act does not affect the status of the person as the father or mother of a child') was taken to have both a retrospective and prospective effect,[6] meaning that if a person carried a pregnancy and gave birth, they were the child's legal mother, 'irrespective of their legal gender at the time of birth' (1 para.146). As to McConnell's argument that a requirement that he be registered as YY's mother would breach both his and YY's rights to respect for their private and family life under Article 8 of the ECHR, Sir Andrew McFarlane considered that while there would be an interference with Article 8 here,[7] this was justified in the name of the need to have a record of

5 As Sir Andrew McFarlane put it (1 para.139): 'It is undoubtedly the case that throughout history the role of being a gestational mother has been undertaken by females, but is being female the essential or determining attribute of motherhood? There is a strong case to be made for the role of "mother" being ascribed to the person, irrespective of gender, who undertakes the carrying of a pregnancy and who gives birth to a child. In that regard, being a "mother" is to describe a person's role in the biological process of conception, pregnancy and birth; no matter what else a mother may do, this role is surely at the essence of what a "mother" undertakes with respect to a child to whom they give birth'.

6 It had a retrospective effect in that the issuing of a Gender Recognition Certificate to a person who was already a parent had no effect on their existing parental status (i.e., they could be a male mother or female father) (1 para. 142). And it had a prospective effect in that a person's potential status as mother or father was effectively predetermined and was not affected by the issuing of a Gender Recognition Certificate (1 paras.143–146).

7 Sir Andrew McFarlane noted that the requirement that McConnell be registered as 'mother' would 'adversely impact upon TT's [McConnell's] human dignity and his human freedom' (1 para.251) in a context in which '[t]he psychological and social reality for TT and YY is and will be that TT is YY's male parent, his father' such that '[t]o require that TT be registered as "mother" is plainly wholly contrary to TT's view of himself, his gender and his role in his child's life, and this, as he grows up, is also entirely likely to be the case for YY also' (1 para.250). He also considered that even if, as the Government had argued, there would be relatively few occasions on which YY's full birth certificate would be needed, if such an event did occur this was 'very likely to be an occasion of exquisite embarrassment and confusion for both parent and child', with the very possibility of its happening at all being 'a legitimate cause for significant anxiety and distress on the part of TT, and probably YY when he is older, to the extent that this on its own is an interference with their right to respect for private and family life' (1 para.252).

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the person who had given birth to a child. The impact on McConnell, 'significant though it will be were it to occur', was considered to be:

> very substantially outweighed by the interests of third parties and society at large in the operation of a coherent registration scheme which reliably and consistently records the person who gives birth on every occasion as "mother" (1 para.272).

McConnell was accordingly to be registered as YY's mother, and a declaration of parentage confirming this was issued.

McConnell appealed, and the case went on up to the Court of Appeal, which, as Alan Brown has noted, took a much narrower approach in its focus on statutory interpretation (10 p158 and 165–170; 6 para.28). The Court agreed with the High Court's interpretation of Section 12 as both retrospective and prospective and also with the position that had been reached on the question of the compatibility of that interpretation with the rights of McConnell and his son under the ECHR. The interference with the Article 8 rights of McConnell and YY here was not a 'trivial' one, the Court emphasised; it was 'an example of the state requiring a trans person to declare in a formal document that their gender is not their current gender but the gender assigned at birth' that represented 'a significant interference with a person's sense of their own identity' and an interference too with the family life rights of McConnell and his son (6 para.55).[8] However, it was deemed to be justified in its pursuit of the aims of protecting the rights of children in having information about the person who had given birth to them recorded (a line of reasoning that was connected to the notion of the child's right to knowledge of origins) and maintaining 'a clear and coherent scheme of registration of births' (6 para.58). The appeal was therefore dismissed, with the Court of Appeal holding that the scheme set out in the Gender Recognition Act required McConnell to be registered as YY's mother and that this did not violate his ECHR rights.

3. THINKING THROUGH THE *MCCONNELL* CASE: BETWEEN LEGAL AND SOCIAL REALITY

The conceptualisation of legal motherhood that emerged from the *McConnell* case[9] – a conceptualisation that defined legal motherhood in terms of carrying a pregnancy and giving birth – assumed a series of distinctions: between legal gender and legal parenthood, between legal parenthood and the experience of parenthood, and between legal and social constructions of motherhood. These were all expressed in the gap that was involved here between McConnell's sense of himself as YY's father and his legal categorisation as YY's mother; and it is this gap that has been the focus of the literature concerning the case.[10] Two lines of thinking about addressing this gap have emerged. One suggests moving beyond legal motherhood and legal fatherhood entirely and adopting a gender-neutral model of legal parenthood. The second suggests retaining the terms 'mother' and 'father' in law but rethinking the way in which they are constructed.

3.1 BEYOND LEGAL MOTHERHOOD AND LEGAL FATHERHOOD

At the heart of the literature that suggest moving beyond legal motherhood and legal fatherhood is the idea of a 'gender-neutral' model of legal parenthood (e.g., 7 p37; 11; 17 p170–174; 20 p1487–1488).[11] The starting point here is that the terms 'mother' and 'father'

8 It was considered to involve an interference with the family life rights of McConnell and his son 'because the state describes their relationship on the long form of YY's birth certificate as being that of mother and son; whereas, as a matter of social life, their relationship is that of father and son' (6 para.55).

9 And specifically from the High Court's judgment (see esp. 1 para.279: 'The principal conclusion at the centre of this extensive judgment can be shortly stated. It is that there is a material difference between a person's gender and their status as a parent. Being a "mother", whilst hitherto always associated with being female, is the status afforded to a person who undergoes the physical and biological process of carrying a pregnancy and giving birth'). As noted above, the Court of Appeal was more focused on statutory interpretation. See n4.

10 This has been framed in different ways – e.g., between legal reality and lived/social reality (10 p168; 16 p178; 9 p234; 17 p122); between law and identity (7 p37); between legal recognition and experience (13 p323); and 'between the gendered descriptors of legal parenthood and the gender of the trans parent' (12 p177). See also the article by John Eekelaar referred to at (18), and see too the reference by Sir Andrew McFarlane in his judgment to the 'tension' between 'legal parentage' and 'social/psychological parentage' here (1 para.147).

11 See also, on '[s]eparating motherhood from gestation' and focusing on intention to parent as a way of '[contributing] to the de-gendering of legal parenthood' the article by Zaina Mahmoud and Elizabeth Chloe Romanis referred to at (17 p137). And for an earlier argument in favour of gender-neutral legal parenthood, see the chapter by Jens M. Scherpe and Peter Dunne, referred to at (21 p659–660).

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are gendered in practice, and that a gender-neutral approach would involve using the term 'parents' instead. This is the approach that is already taken in some contexts in family law, namely in adoption orders and parental orders.[12] It is also the approach that McConnell himself proposed, suggesting as he did that if he could not be registered as YY's 'father', he ought to be registered as his 'gestational parent' or 'parent' instead.

In the literature that has taken up this idea, the argument made is that a gender-neutral approach would be more inclusive and that it would at the same time ensure the registration of the person who had given birth (thereby addressing the policy concern expressed by the courts about the need to have this information recorded). There is a sense in which the current conceptualisation of legal parenthood was already limited, and that the *McConnell* case is yet another expression of that. Emily Jackson has argued, for example, that a gender-neutral form of legal parenthood would be more generally inclusive, including for families where there are two mothers or two fathers (11 p590). As noted above, it is currently only possible to have one 'mother' in law – the person who gave birth to the child – and in the case of a female same-sex couple, the 'other' mother will be called the 'second female parent'.[13] The gender-neutral approach that Jackson suggests 'would treat both women as parents, although one would be registered as the parent who gave birth' (11 p590). It would also, Jackson adds, be more accommodating of families where there are more than two parental figures (the maximum number of 'parents' permitted under the current concept of legal parenthood) (11 p591). On this model, parenthood would be attributed by registration and would be more concerned with social parenthood than biological parenthood, meaning that it would be possible, for instance, to recognise four parents where a child is being raised by two biological parents and two step-parents, or three parents where a child has been born of a co-parenting arrangement involving a couple and their friend (11 p591).

What effect would a move to a gender-neutral model of legal parenthood have in practice? As Jackson points out, the very idea requires us to think about whether there is something specific that the law is getting at when it uses the terms 'mother' and 'father' at all. Jackson goes on to explain how the main practical difference between the statuses of motherhood and fatherhood in law is in relation to parental responsibility, in that mothers acquire it automatically, whereas for fathers it is more complex: they may acquire it by being married or in a civil partnership with the mother, by way of birth registration on the baby's birth certificate, by agreement with the mother, by a court order, or not at all (11 p590).[14] But, Jackson writes:

> [i]f the law were no longer to refer to mothers and fathers, this distinction could be retained by giving automatic parental responsibility to the parent who gave birth only, while the other parent(s) could acquire it through their relationship with the mother, or as a result of being registered on the child's birth certificate (or by making a parental responsibility agreement, or through a court order) (11 p590).

It is not a distinction, she emphasises, that requires the retention of the legal categories of motherhood and fatherhood (11 p590–591).[15] And that latter point – that it is the legal categories of motherhood and fatherhood that are the focus here – is an important one to emphasise. The move would be towards gender-neutral terminology at the level of law, meaning that someone could be registered as a 'parent' in law while defining or identifying themselves as a child's 'mother' (11 p591).[16]

In the case of a gender-neutral model of legal parenthood, a remaining question would be that of the relative position of the parents, particularly given the central position that the person who has given birth currently holds when it comes to the determination and attribution of legal parenthood. Liam Davis has raised the question of what would happen to this position in the

12 S67(1) Adoption and Children Act 2002; ss54(1) and s54A(1) Human Fertilisation and Embryology Act 2008.

13 In the circumstances set out in (and subject to the provisions contained in) ss42–45 of the Human Fertilisation and Embryology Act 2008.

14 See ss2 and 4 of the Children Act 1989.

15 See also Alan Brown's argument that 'this substantive difference' (in terms of acquisition of parental responsibility) 'does not require the use of gendered descriptors, because it is premised on the fact of gestation, and on children having (at least) one adult with legal responsibility for them from birth') (12 p180).

16 There are parallels here with wider debates about moving beyond the legal concepts of sex/gender. See, e.g., the report by Davina Cooper and colleagues referred to at (22) and also the chapter by Claire Fenton-Glynn referred to at (23).

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case of the adoption of the term 'gestational parent' instead of 'mother' to record the person who had given birth (13 p326). On the one hand, there would still be such a recording. On the other hand, the features that currently underpin and, in many ways, give rise to the central position that the person who has given birth holds as the legal mother would arguably be diluted by a move away from the terminology of legal motherhood. This would be particularly so in the context of a model that recorded the gestational parent but was beyond that primarily concerned with social parenthood rather than biological parenthood (as per Jackson's model: 11 p589–591).

3.2 RETHINKING THE LEGAL CATEGORIES OF MOTHERHOOD AND FATHERHOOD

A second line of thinking to have emerged in the literature suggests retaining the terms 'mother' and 'father' in law but rethinking the way in which they are constructed. Two ideas have been articulated here. One is about enabling people to be recorded using the term that they identify with (see, e.g., 19 p175; 16 p189)[17] – an approach that Elizabeth Chloe Romanis and Alan Brown argue 'would move toward gender neutrality while making space for persons for whom their gender is significant' (16 p189). Alan Brown has further argued that 'gender retains limited *substantive* significance within legal parenthood' and that there is 'flexibility' within the concept (reflected, on his analysis, in the parenthood provisions relating to female same-sex couples[18]), such that even as it is currently formulated 'the concept of legal parenthood should be capable of describing trans parenthood using appropriate gendered language' (12 p178 and 184–185).

A second idea to have been expressed in this context is about retaining the terms 'mother' and 'father' in law but rethinking the normative assumptions that underpin their current constructions. Alice Margaria has argued, in particular, that keeping the legal terms 'mother' and 'father' might be useful in order to make possible measures that are aimed at targeting these assumptions (9). Her account is focused on the 'conventional' account of fatherhood articulated in law, an account in which:

> being a father has been generally understood as being at the same time the biological progenitor of the child who has contributed sperm to the child's conception, married or in a stable relationship with the child's mother; heterosexual and "cis"; and the family breadwinner (9 p235).[19]

By contrast, Margaria argues, 'caring roles have been traditionally associated with maternal and female figures', such that 'paternal involvement in the child's life has long been considered irrelevant to make someone a (legal) father' (9 p235).[20] Margaria goes on to argue that the *McConnell* case[21] presented an opportunity to rethink this, in that recognising McConnell as the father of his child would have involved the challenging of the assumptions about care, reproduction, and parenting that the 'conventional' conceptualisation involves (9 p236–237 and 244–246). In particular, it would have involved a departure from 'the long-presumed indispensability of biology and heteronormativity as defining features of the father figure', 'acknowledging care, an attribute which has been traditionally considered as feminine and maternal, as a relevant parameter for attributing legal fatherhood', and a 'recognition that men, and even more controversially trans men, are able to care, and that trans men are not "mothers" if they do (care)' (9 p245). It would, Margaria suggests, have engaged with the gendered construction of care in family law; and the sense is that doing so would have enabled a challenging of the assumptions underlying the current conceptualisations of motherhood and fatherhood.

17 And for an earlier argument in this respect, see also the article by Sheelagh McGuinness and Amel Alghrani referred to at (24, p280–283).

18 Alan Brown argues that 'the significance of the parenthood provisions is that legal parenthood at birth is no longer purely gendered, illustrating the concept's flexibility' and that 'this context, where legal parenthood is explicitly separated from genetics and biology, and where the legal regime employs de-gendered language for some parents, starkly illustrates how the decisions regarding trans legal parenthood are not reflective of the flexibility within legal parenthood' (12 p184).

19 And see further Alice Margaria's book, referred to at (25).

20 See further the reference to the article by Alice Margaria at (14).

21 And also a European Court of Human Rights case that Margaria examines too: Applications nos. 53568/18 and 54741/18, *O.H. and G.H. v Germany* (2023, European Court of Human Rights).

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Given this focus, Margaria is hesitant about the idea of 'de-gendering' legal parenthood, noting that while it would have many 'practical and structural benefits', at the same time, 'some doubts remain as to whether de-gendering legal parenthood is the way to go in the wider field of family law' (9 p245–246). She refers us to Martha Fineman's argument about the consequences for mothers of a de-gendering of parenthood in this context (26 [and see esp. Ch.4]), arguing that given that:

> social and legal constructions of "fatherhood" and "motherhood"... continue to be sustained and reinforced by many stereotypical assumptions which keep men and fathers out of the childcare picture, with significant repercussions [for] the lives of women and children... an argument could be made that fatherhood – as a legal institution – (still) needs specific measures which confront and redress fathers' expected role as breadwinners and/or secondary carers (9 p246).

'If the ultimate and overarching aim is the legal recognition of diverse, caring family relationships', Margaria concludes:

> de-gendering caring roles by insisting on the reconstruction of fatherhood around care might be a first, necessary step on the longer road to achieving legal support and substantive equality for all parents and children (9 p246).

A question perhaps arising from this is of whether the terms 'mother' and 'father' need to be retained at the level of law if the issue is one of 'de-gendering caring roles' (9 p246). But implicit in Margaria's analysis is the sense that the association between care and motherhood in family law and more widely between the resulting legal construction of motherhood and social constructions of motherhood is too close to not retain the terms – that law would be missing something by doing away with them. Retaining the terms would, on her argument, therefore enable targeted measures that at the same time challenged these associations and the assumptions underlying them. The focus of Margaria's account is, in that way, on moving towards gender neutrality but at the level of the practices associated with motherhood and fatherhood. It is about moving beyond the way in which motherhood and fatherhood are currently constructed both legally and socially.

4. BEYOND LAW'S (EXISTING) IDEA OF THE FAMILY

The two lines of thinking that have emerged in the literature – the one suggesting a gender-neutral model of legal parenthood and the other suggesting a rethinking of the current constructions of legal motherhood and fatherhood – are both oriented towards the gap that the current conceptualisation of legal parenthood involves between legal reality and lived social reality. They highlight questions of the relationship between the legal concepts of gender and parenthood and between these legal concepts and social and psychological understandings of gender and parenthood; and they also speak more broadly to questions of the legal constructions of care, identity, and reality. But underpinning both lines of thinking is also the sense that an underlying issue in this context is with the way in which 'family' is conceptualised in law, and that moving beyond the current formulation of legal motherhood would enable a rethinking of this.

The theme is one that runs through contributions to the literature in this context, starting with Claire Fenton-Glynn's focus on it in her analysis of the High Court's judgment in the *McConnell* case. That judgment exposed, she argues, 'the gendered, heteronormative conception of the family currently in operation under English law' (7 p36)[22] – a conceptualisation that (currently) finds its expression in the assumption that there will be two parents performing 'different, yet complementary, legal roles' (7 p36). Identifying a legal mother in this case enabled the maintenance of that conceptualisation, Fenton-Glynn suggests; more specifically, it was about maintaining that conceptualisation. The sense underpinning Fenton-Glynn's analysis is that family law is binding itself in this way – that in remaining fixed to this conceptualisation of 'family' (a conceptualisation that underpins and reinforces the conceptualisation of legal motherhood in question), it is limiting its own capacity and potential when it comes to the legal recognition of family life.

22 See further on this the article by Julie McCandless and Sally Sheldon referred to at (4) and Alan Brown's book referred to at (27).

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The point is echoed by Alan Brown, who in his commentary on the Court of Appeal's judgment in this case emphasises 'how the approach to legal parenthood obscures and excludes the reality of trans parenting' (10 p169).[23] He agrees with Fenton-Glynn's analysis of the first instance judgment and her point that '[i]n its failure to challenge the status quo, the judgment further entrenches the traditional assumptions underpinning English family law' (7 p36) but adds that this can also 'clearly be levelled at the Court of Appeal', the judgment of which 'not only failed to challenge the status quo, it represented a failure of ambition by not even engaging with significant aspects of that status quo' (10 p170). Brown goes on to argue that a 'more progressive approach to the interpretation of Article 8' could have led to – and would have involved – 'the granting of a "declaration of incompatibility"', and that 'this would have left the precise resolution of this area of "difficult or controversial social policy" [6 para.82] to Parliament, avoiding concerns around the boundaries of the appropriate judicial role' (10 p170). The sense, as on Fenton-Glynn's analysis, is that there is a need for change in this context and a need, more specifically, for a move beyond the current way of conceptualising and attributing legal parenthood in English and Welsh family law (10 p170–171).

In the case of the second line of literature – on retaining the legal categories of motherhood and fatherhood but rethinking the way in which they are constructed – the target is the normative assumptions that underpin the current conceptualisations of these categories. Similarly to the first strand of literature, the argument here is that these assumptions are bound up in a deeper conceptualisation of family and that shifting them would bring about a change in how family is conceived of too. Margaria's work in this context is, as noted above, focused on the construction of legal fatherhood in this respect, and specifically on an argument about 'the reconstruction of fatherhood around care' (9 p246). But its implications run much further to the construction of legal motherhood too, because the underlying argument is one about what Margaria refers to elsewhere as 'a conventional understanding of care as maternal and "naturally" stemming from gestation and birth' (14 p240), and so, more specifically, about the way in which care has been assumed of and located in law in relation to the person who has given birth (the legal mother) (14 p231 and 239). The argument is that this construction of care is fundamental to the way in which legal motherhood has been constructed and that this has had ripple effects for how legal fatherhood and legal parenthood are understood and 'detrimental consequences for the recognition and the protection of caring relationships in non-traditional families' in practice (14 p240). Once again, therefore, the point is one about moving beyond this conceptualisation of legal motherhood, about the possibilities of family law after this conceptualisation of legal motherhood.

On both accounts then, the argument is that moving beyond the current approach to legal motherhood would open up the current conceptualisation of family in law. This is an argument that reflects how central a position the category of the legal mother currently holds in family law;[24] and the idea is that after this conceptualisation of legal motherhood – whether that 'after' takes the form of gender-neutral parenthood, and so a doing away with the categories of legal motherhood and legal fatherhood entirely, or the retention and rethinking of these categories – the landscape of family law would be different. A remaining question – and one that echoes the questions noted earlier on – would perhaps be that of what would happen to the assumptions that have been bound up in the construction and articulation of the category of legal motherhood to date. But the idea emerging from the two lines of thinking considered here is that the question itself would dissolve: that in the case of a gender-neutral model of legal parenthood, these assumptions would be diluted by the move to the term 'gestational parent' (meaning that there would be no legal category of motherhood with which to associate them) and that in the case of the retention but rethinking of the legal categories of motherhood and fatherhood, it is these assumptions that would be the very target.

23 See also Alan Brown's argument in his later article (referred to at (12)) about how 'trans parenthood provides another example of the problems caused by the continuing reliance upon the binary, two-parent model of the traditional, heterosexual, cis, nuclear family within the understanding of legal parenthood' (p185).

24 Or perhaps to put it more specifically, gestation. As Elizabeth Chloe Romanis and Alan Brown put it, '[t]he framework of legal parenthood reasons from the body of a pregnant person. Gestation is the anchor for all the rules determining legal parenthood' (16 p186).

5. CONCLUDING THOUGHTS

The *McConnell* case raised fundamental questions about the meaning of being a 'mother' in law and specifically about the relationship between the legal concepts of gender and parenthood as well as between these legal concepts and social and psychological understandings of gender and parenthood. The debate that has emerged in the literature in this context is one that has primarily involved two strands of thinking: one that suggests moving beyond the terms 'mother' and 'father' in law and adopting a gender-neutral model of legal parenthood and another that suggests retaining the terms 'mother' and 'father' in law but rethinking the way in which they are constructed. As I have highlighted in this paper, both lines of thinking are fundamentally about closing the gap between legal and social reality. But they are also underpinned by a sense that doing away with the current conceptualisation of legal motherhood would open up the capacity and potential of family law when it comes to the legal recognition and protection of family life. The question posed by the literature in this context becomes, in this way, one of family law after legal motherhood, of the possibilities of family law after this conceptualisation of legal motherhood.

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The author has no competing interests to declare.

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